

**QUARTERLY ATTORNEY REPORT
GENERAL DISTRICT
July 2004**

TO: CRWCD BOARD OF DIRECTORS

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Dear Directors:

This report identifies matters for discussion at the River District's July 20-21, 2004, meeting. A separate Confidential Report (Attachment A) addresses confidential matters. The information in this report is current as of July 8, 2004, and will be supplemented as necessary before or at the Board meeting.

I. EXECUTIVE SESSION

The following is a list of matters that qualify for discussion in executive session pursuant to C.R.S. §§ 24-6-402(4)(b), 4(e), and 4(f). As noted below, there is very little to report on some of the items listed but it is possible that a development requiring the Board's attention may occur after the Board material is mailed but prior to the meeting date.

- A. C-BT Litigation, Green Mountain Reservoir, Federal District Court.
- B. Windy Gap Firing Project.
- C. Blue River Decree - Negotiations with Denver and Summit County on Metro Area and Related Issues.
- D. Blue River Decree - Green Mountain Reservoir Fill Administrative Issues.
- E. Denver's North-End/Moffat Tunnel Collection System Project.
- F. Shoshone Power Plant - Call Reduction Issues.
- G. City of Golden (Vidler Tunnel Company) v. Simpson, Case No. 03CW176, Water Division 5.

- H. SECWCD's Application to Make First Enlargement of Boustead Tunnel Absolute, Case No. 02CW324, and Application for Second Enlargement of Boustead Tunnel, Case No. 02CW365, Water Division 5.
- I. Application of Flattops Ranch, Upper Eagle Regional Water Authority, and Eagle River Water & Sanitation District, Case No. 03CW159, Water Division 5.
- J. Bluestone Water Conservancy District - Kobe Pipeline Project.
- K. Black Canyon National Monument:
 - 1. Federal Reserved Right, Case No. 01CW05, Water Division 4.
 - 2. Case No. 03SA321, Appeal to Colorado Supreme Court of Order on Stay in Case No. 01CW05.
 - 3. TU/WRA Federal Lawsuit regarding Black Canyon Reserved Right, Case No. 03-WY-1712.
 - 4. CWCB's Instream Flow Claim for the Black Canyon, Case No. 03CW265, Water Division 4.
- L. Application of United States, Bureau of Reclamation for Taylor Park Reservoir Exchange, Case No. 90CW164, Water Division 4.
- M. Colorado River Compact Issues.
- N. Personnel Matters.

II. GENERAL & GOVERNANCE MATTERS

Peter Fleming gave two presentations at the Colorado Bar Association's water law conference held in Steamboat on June 18 and 19, 2004. Copies of Peter's outlines on (1) "Case Law and Legislative Update", and (2) "RICDs and Compact Impairment" are included in your Board material for your reference, as Attachments B and C .

III. WATER MATTERS BY BASIN

A. Colorado River Basin.

1. C-BT Litigation, Green Mountain Reservoir, Federal District Court.

We continue to wait for a decision by Judge Nottingham on the Motions to Dismiss that were filed by the United States, Bureau of Reclamation and the Northern Colorado Water Conservancy District last year. Oral argument on the motions was held shortly after the Board's April meeting. Interestingly, the court orally granted the State's motion to intervene in the case without having ruled on the motions to dismiss. Overall, the argument went well (Anne Castle did a great job) but it is a treacherous business to guess the court's decision based on oral argument.

The USBR reported at a river operations meeting held on June 29, 2004, that the main part of the slide has moved three inches over the past 18 months. Reclamation claims that, due to the lack of prior data, they do not know whether this an acceleration of the historical rate of slide movement. At this time, Reclamation does not propose any change to the reservoir's existing release rate restrictions. *It is possible that the court may issue an order prior to the Board meeting. If so, the Board may wish to discuss the order or any other development in executive session.*

2. Windy Gap Firming Project.

We continue to wait for the Opinion of the Solicitor of the Department of Interior regarding the proposal of the Municipal Subdistrict, Northern Colorado Water Conservancy District, to "pre-position" C-BT Project water in a new non-federal reservoir as part of the Subdistrict's proposed firming project. *The Board may wish to discuss any new developments in executive session.*

3. Blue River Decree - Negotiations with Denver and Summit County on Blue River Decree Compliance Issues.

Denver has provided us with a settlement proposal on the Blue River Decree compliance issues. The proposal and related issues are discussed further in the Confidential Report. *We recommend that the Board discuss the issues in executive session.*

4. Blue River Decree - Green Mountain Reservoir Administrative Fill Issues.

This issue concerns the length of time the 1935 priority to fill Green Mountain Reservoir stays on the river. Denver has proposed a method of administration that would result in the 1935 priority staying on after the reservoir has achieved a paper fill (a.k.a. "legal fill"). Denver would benefit by this method of administration because water physically stored in Green Mountain Reservoir reduces the amount of water that Denver must pay-back in "substitution" to the Bureau of Reclamation to replace water Denver previously stored out-of-priority. This method of administration would injure West Slope water rights because it (1) would result in an expansion of the contemplated draw of Green Mountain Reservoir's 1935 priority, and (2) would result in Denver's 1946 priority "leap-frogging" over West Slope priorities that are senior to 1946 but junior to Green Mountain Reservoir's 1935 priority.

Board members already should have received a copy of my June 23, 2004, letter to the State Engineer on this issue but a copy is included with your Board material for your convenience (see Attachment D). Letters supportive of the River District's position were submitted to the State Engineer by the attorneys for the Middle Park Water Conservancy District, the Orchard Mesa Irrigation District, and the Grand Valley Water Users Association. Climax and Xcel Energy have also been vocally supportive of the River District's position.

The State Engineer submitted a draft Green Mountain Reservoir fill policy on July 2, 2004. The State Engineer held a meeting yesterday, July 7, 2004, during which he explained the draft

policy and invited discussion (which was at times contentious). Relatively minor modifications were made to the draft policy today, July 8, 2004, the most significant of which is that the State Engineer clarified that the policy will be implemented for this year only. We provided relatively minor comments on the revised policy via email today. A negotiations group will be established with up to two individuals from each interested agency to try to reach agreement on a permanent policy on the administration of the Green Mountain Reservoir fill. A copy of the interim policy dated July 8, 2004, is included with your Board material as Attachment E.

The issue continues to evolve, even as we prepare the Board report. *We recommend that the Board discuss this matter further in executive session.*

5. Denver's North-End/Moffat Tunnel Collection System Project.

We reported previously that Grand County and Denver are negotiating an intergovernmental agreement that would provide Grand County with some of the rights in the NEPA process that it would have secured if the Corps of Engineers had granted the county cooperating agency status. The negotiations are ongoing but it does not appear that substantial progress has been made. *The Board may wish to discuss this matter in executive session.*

6. Shoshone Power Plant - Call Reduction Issues.

Pursuant to the Board's prior direction, River District staff and counsel have continued to discuss with interested parties whether to pursue a long-term agreement with Xcel Energy, Denver, and other transmountain diverters on conditions for reduction of the river call by the Shoshone Power Plant water rights. *We recommend that the Board discuss this matter further in executive session.*

7. City of Golden (Vidler Tunnel Co.) v. Simpson, Case No. 03CW176, Water Division 5.

This case (1) concerns the right of Golden to divert its junior Vidler Tunnel rights before it fully exercises its senior rights for the tunnel, and (2) tangentially raises complicated issues about Golden's ability to divert the Vidler Tunnel rights as against Denver's senior water rights for Dillon Reservoir and the Roberts Tunnel pursuant to a Stipulation and Agreement among the River District, Denver, and Golden's predecessor in interest, the Vidler Tunnel Company, in Case No. 91CW252 (the Denver Substitution Decree). The Water Court ordered Golden to publish the Complaint, Answer, and Counter-claim in the March 2004 Resume so that interested parties would have an opportunity to participate in the case. We participated in a settlement conference with the parties and Denver on March 15 in an effort to resolve the second issue, but we were not successful. We therefore filed a Statement of Opposition/Answer in May, pursuant to the Board's prior direction. Denver, Middle Park Water Conservancy District, Northern Colorado Water Conservancy District, Orchard Mesa Irrigation District, Ute Water Conservancy District, and the Grand Valley Water Users Association also filed statements of opposition.

Golden filed a motion for summary judgment on both issues on June 29, 2004. Other parties have obtained an extension of time, up to August 2, in which to respond to the motion for summary judgment and we propose to seek a similar extension. *We recommend that the Board ratify the Statement of Opposition/Answer we filed on behalf of the River District (a copy is included with your Board material as Attachment F to this memo). This case is discussed further in the Confidential Report, and the Board may wish to discuss this case in executive session.*

8. Southeastern Colorado Water Conservancy District's Application to Make Absolute the First Enlargement of the Boustead Tunnel, Case No. 02CW324, and Application for Second Enlargement of Boustead Tunnel Water Right, Case No. 02CW365, Water Division 5.

a. Case Nos. 02CW324 and 02CW365.

As previously reported, these cases involve claims of the Southeastern Colorado Water Conservancy District ("SECWCD") to make absolute the remaining portion of the 100 c.f.s. first enlargement to the transmountain Boustead Tunnel component of the Fry-Ark Project (Case No. 02CW324) and to adjudicate an absolute right to a 30 c.f.s. second enlargement of the tunnel (Case No. 02CW365), for a total capacity of 1,030 c.f.s. We have met with representatives of the SECWCD, the USBR, and our co-objectors (the Town of Basalt, the Basalt Water Conservancy District, and the City of Aspen) numerous times to discuss these cases, most recently on June 28, 2004.

At the June meeting, Malcolm Wilson from the USBR explained the various locations, conveyance capacities, bypass requirements, design capacities, and limitations of the various collection systems and the Boustead Tunnel. We also discussed the measurement discrepancies that have occurred at the East Slope discharge of the Boustead Tunnel. The USBR again reiterated that it will operate the system so as not to allow more than 945 c.f.s. through the Boustead Tunnel and, as it improves the system, exceedances of 945 c.f.s. will be less frequent. The USBR also explained that the Division 2 Engineer needs more data to assess the appropriate measurement and rating for the East Slope discharge of the Boustead Tunnel, so this information will take more time.

Since our January meeting, we have been awaiting a settlement proposal from SECWCD and we received this proposal a few days prior to our June meeting. We plan to meet again in early August and hope to schedule a tour of the Fry-Ark Project collection system before the August meeting. *We recommend that the Board discuss the issue further in executive session.*

b. Twin Lakes Exchange.

The Board may recall that the City of Aspen is concerned about a related issue regarding the operation of the Fry-Ark/Twin Lakes exchange – by which the Twin Lakes Reservoir and Canal Company bypasses up to 3,000 acre-feet of water from its West Slope diversions and is repaid for those bypasses by the Bureau of Reclamation on the Front Range. In May, representatives from

SECWCD, Twin Lakes, Aspen, Pitkin County and the River District met to discuss this issue but did not resolve the issue. At that meeting, Twin Lakes informed the other parties that it refused to bypass water. Thereafter, Aspen requested the Division 5 Engineer to curtail Fry-Ark Project diversions in the Roaring Fork River to the extent that the exchange had not already been operated (approximately 1,700 acre feet). The Division Engineer and Reclamation agreed with Aspen's position and implemented measures to curtail Fry-Ark Project diversions from the headwater tributaries of the Roaring Fork River.

9. Application of Flattops Water Company, Upper Eagle Regional Water Authority, and Eagle River Water & Sanitation District, Case No. 03CW159, Water Division 5.

As previously discussed, this case involves the diversion of water from Water Division 6 for use by the Eagle River entities in Water Division 5 to facilitate additional exchanges up the Eagle River. The case has been re-referred from the Water Referee to the Water Judge and will be "at issue" (*i.e.*, ready for substantive pre-trial issues) on July 26, 2004. We recently met with the applicants' attorneys and engineers. At the meeting, the applicants' attorneys updated us on the status of the negotiations with the other parties and we expressed our concerns with the proposed decree. Specifically, we stated that: (1) the decree must not result in an expansion of the amount of water the Flattops Water Co. has historically diverted out of the Yampa River Basin into the Colorado River Basin; and (2) the decree must include detailed provisions to ensure that the intended uses are supported by accurate accounting. We also expressed concern about certain other aspects of the application. The applicants promised to submit a revised proposed ruling intended to address our concerns. *We recommend that the Board discuss this case further in executive session.*

10. Bluestone Water Conservancy District - Kobe Pipeline Project.

We are working with Chevron and the Bluestone Water Conservancy District on an Agreement to design and construct a portion of the proposed Kobe Pipeline System to pump water from the Colorado River upstream to Roan Creek under a portion of the Kobe Canal water right, which the River District and Bluestone previously leased to Chevron. We have not received comment from Chevron on the current draft of the agreement, but a copy is included with your Board material as Attachment G to this memo, for conceptual review.

The basic "deal" of the proposed agreement is that funding for the project will be provided equally by Chevron and the Bluestone Management Committee. Bluestone will own and operate the Kobe Water System once it is completed, but Chevron will have an option to acquire the Kobe Water System for use in connection with Chevron's oil shale operations, provided it constructs a replacement system for use by Bluestone free of charge. The River District's obligations under the proposed agreement include: (1) establishing an operations account for the Kobe Water System project which will allow the River District to receive funds from Bluestone and Chevron and pay bills relating to the project; (2) acting as the purchasing agent for materials and labor required to

complete the project; (3) supporting Chevron's continuing diligence efforts; and (4) purchasing and maintaining liability insurance to protect all parties from any claims resulting from the construction, operation, maintenance, repair and use of the Kobe Water System. The cost of obtaining the insurance will be paid by Chevron and Bluestone. We will be meeting with the attorneys for Bluestone and Chevron on August 4 to discuss the draft agreement. Dave Merritt also has provided a memo on the project in your Board materials. *We recommend that the Board provide conceptual level confirmation of the River District's role in the agreement.*

11. River District's Diligence Application, Case No. 03CW41, Water Division 5.

We filed this diligence application on over 45 water rights at the end of February 2003. Pursuant to the Board's prior direction, we recently entered into a stipulation with MidCon Realty to resolve its concerns with the application. MidCon owns water rights in the Coal Creek Basin (tributary to the Crystal River) that are junior to the River District's West Divide Project water rights. The stipulation provides that if Osgood Reservoir is constructed at its currently decreed location, the River District and West Divide District will replace MidCon's out-of-priority depletions as against the Osgood Reservoir water storage right with yield from Osgood Reservoir, up to a maximum of 20 acre feet per year. We are still working to resolve the concerns of the two pro se objectors but they have been slow to respond to our overtures. We responded to the Division Engineer's summary of consultation, and we plan to meet with the Division Engineer to discuss any remaining concerns. It appears that we may need to amend the application to correct minor errors in some of the legal descriptions, but we want to meet with the Division Engineer to discuss his concerns before we file and publish the amendment.

We recommend that the Board ratify the June 15, 2004 stipulation with Mid-Con Realty. A copy of the stipulation is included with your Board material as Attachment H to this memo.

B. Yampa and White River Basins.

1. Application of Flattops Water Company, Upper Eagle Regional Water Authority, and Eagle River Water & Sanitation District, Case No. 03CW159, Water Division 5.

This case was filed in Water Division 5 but it also concerns water diverted from Water Division 6. Please see the discussion in paragraph III.B.9, above, regarding this matter, as well as the discussion in the Confidential Report.

2. CRWCD Diligence Application, Case No. 04CW27, Water Division 6.

Pursuant to the Board's resolution adopted at the April Board meeting, we filed this diligence application on over 20 water rights associated with the Great Northern, Juniper-Cross, and Savery-Pot Hook Projects at the end of June 2004. The period for filing statements of opposition will expire at the end of August. We also filed notice of the Board's intent to abandon the water rights

associated with the Elk River and Hayden-Mesa Projects. Please let us know if you would like a copy of the diligence application.

C. Gunnison River Basin.

1. Black Canyon Litigation.

a. Reserved Rights Application, Case No. 01CW05, Water Division 4 and Case No. 03SA321, Colorado Supreme Court.

As discussed at the last Board meeting, the River District and other parties, including the CWCB, State Engineer, Colorado River Energy Distributors Association (“CREDA”), and the Upper Gunnison River Water Conservancy District, filed a petition with the Colorado Supreme Court that requests the court to reverse the water court’s order staying the proceedings in the reserved rights quantification, Case No. 01CW5. At the April meeting, we reported that the supreme court ordered oral argument for May 24, 2004. Tim Beaton, who represents CREDA, and Carol Angel, who represents the State entities, argued for the petitioners before the supreme court. We believe the oral argument went well but, as noted previously, it is very difficult to predict the outcome based on questions received by the court at oral argument. We hope to receive a ruling on the petition soon.

b. Federal Complaint of Environmental Groups, Case No. 03-WY-1712.

As the Board may remember, the environmental groups filed a lawsuit in federal court alleging the United States: (1) failed to act pursuant to the National Park Service Act (“NPSA”) and the Black Canyon Act (“BCA”) in violation of the Administrative Procedures Act; (2) abandoned federal water rights in violation of the NPSA and the BCA; (3) violated NEPA; (4) made an unauthorized disposition of federal property; and (5) unlawfully delegated federal obligations to the state. As we reported at the last Board meeting, Judge Brimmer denied the United States’ motion to dismiss on April 15, 2004. On June 16, 2004, the environmental groups voluntarily dismissed their first claim for relief because the claim was largely predicated on a Tenth Circuit case that the U.S. Supreme Court recently overruled. We will continue to monitor this case, especially as it relates to the other Black Canyon proceedings.

c. CWCB Appropriation of Peak Instream Flow for the Black Canyon, Case No. 03CW265, Water Division 4.

There have been no developments to report in this case.

It is possible that a ruling may be entered by the Colorado Supreme Court or the federal district court prior to the Board meeting, and the Board may wish to discuss the ramifications of any such ruling or order in executive session.

2. CWCB's Appeal of Upper Gunnison River Water Conservancy District RICD Decree, Case No. 02CW38, Water Division 4, to the Colorado Supreme Court, Case No. 04SA44.

As previously reported, the CWCB, joined by the State Engineer and Division Engineer for Water Division No. 4 ("State"), appealed the Division 4 Water Court's Order granting in full the UGRWCD's application for a RICD on the Gunnison River. The River District entered an appearance in the appeal. The briefing has not yet begun because the State requested and received an extension of time to file their opening brief, up to and including July 26, 2004. If no more extensions are granted, the appeal should be fully briefed by early September.

3. Application of United States, Bureau of Reclamation for Taylor Park Reservoir Exchange, Case No. 90CW164, Water Division 4.

The Division 4 Water Court has requested that Reclamation try to move this long-pending case along. The River District, the Upper Gunnison River Water Conservancy District, and the CWCB are parties to the case (among other objectors), and have historically supported the application. The application claims a 1972 priority for an exchange between Taylor Park Reservoir and the Aspinall Unit in accordance with a series of agreements dating to 1972 to facilitate better management of reservoir storage and flows in the Taylor and Gunnison Rivers. We plan to meet with Reclamation this summer to discuss the case and will report more at the Board's October meeting. *There are some issues in the case that the Board may wish to discuss in executive session.*

4. Aspinall Unit EIS Process.

Pursuant to the Board's direction at the April Board meeting, we requested and have been granted cooperating agency status on Aspinall Unit NEPA process initiated by the USBR. The first meeting will be scheduled to take place in September.

D. South Platte River Basin.

1. City of Longmont RICD Application, Case No. 01CW275, Water Division 1.

The River District filed a statement of opposition to Longmont's RICD application in order to ensure that the RICD right does not unreasonably interfere with the ability of water users in the St. Vrain River Basin to exchange their reusable water supplies in order to reduce or eliminate their future demand for transmountain water. Longmont demonstrated to our satisfaction that there is limited potential for future development and new water demands upstream of the RICD and that the ability to satisfy any future demands will not be impaired by the RICD. Pursuant to the Board's prior direction, we entered into a Stipulation with Longmont consenting to entry of a decree. The Stipulation includes "no precedent" language so that the River District and its constituents are not bound to any specific language or conditions in future RICD decrees or to any interpretation of the law governing RICDs.

2. Draft EIS on Platte River Endangered Species.

We previously reported that the River District would file comments in June to the joint draft Programmatic Environmental Impact Statement (“DEIS”) dated January 23, 2004, prepared by the USBR and the U.S. Fish and Wildlife Service, primarily to address the preferred alternative that proposed to limit the use of reusable return flow on the Front Range. The deadline for review and comment has been extended to August 20, 2004, and we plan to file comments in August.

IV. Interstate Matters.

We continue to work actively on Colorado River Compact issues that are being brought to head by the continuing drought. *As discussed in the Confidential Report, there are some related issues that the Board may wish to discuss in executive session.*

Attachments:

- A. Confidential Report, dated April 9, 2004
- B. Case Law and Legislative Update, Colorado Bar Association, Water Law Conference, June 18, 2004
- C. RICDs and Compact Impairment, Colorado Bar Association, Water Law Conference, June 18, 2004
- D. Letter from P. Fleming to H. Simpson regarding Administration of Green Mountain Reservoir’s 1935 Storage Right, dated June 23, 2004
- E. Policy 2004-4, Administration of Green Mountain Reservoir, dated July 8, 2004
- F. CRWCD’s Statement of Opposition/Answer to Complaint and Amended and Supplemental Complaint for Declaratory and Injunctive Relief, Case No. 03CW176, Water Division 5, dated May 28, 2004
- G. Draft Agreement between Chevron and Bluestone Water Conservancy District, dated June 23, 2004
- H. Agreement and Stipulation, Case No. 03CW41, Water Division 5, dated June 15, 2004